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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1993

REGENTS OF THE UNIVERSITY OF CALIFORNIA, ASSOCIATED STUDENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,
Petitioners,

VS.

AVERELL SMITH, ARLO HALE SMITH, ADLAI SMITH, BRAD SPARKS, JIMMY HOM, EMILY TAYLOR, ALEXA SMITH, THOMAS KISTLER,
Respondents.

On Petition for Writ of Certiorari to the California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED[1]

1. Whether the First Amendment prohibits a state university from using a mandatory student activity fee to create a public forum for on-campus expressive activities by distributing a portion of the fee proceeds on a content-neutral basis to a wide variety of student groups, including groups devoted to political and ideological causes with which some students disagree, where the university has determined that funding such groups furthers its educational mission?

2. Whether the First Amendment prohibits a state university from using a mandatory student activity fee to fund a student government that, among other activities, debates and passes resolutions with which some students disagree that concern a wide variety of local, state, and national issues where the university has determined that funding such activities furthers its educational mission?

3. Whether the First Amendment prohibits a state university from using a mandatory student activity fee to fund lobbying on university- or student-related issues with which some students disagree, where the university has determined that funding such activity furthers its educational mission?

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[1]Petitioners are the Regents of the University of California, the President of the University of California (Jack W. Peltason), the Chancellor of the University's Berkeley Campus (Chang-Lin Tien), the Treasurer of the Regents (Herbert Gordon), and the Associated Students of the University of California, the organization authorized by the Regents to administer student government and student extra-curricular activities at the University of California's Berkeley campus. With the exception of Mr. Gordon, who is an original defendant, the individual Petitioners are the successors in interest of the original defendants David S. Saxon (the President of the University of California when the Complaint was filed) and Albert H. Bowker (the then-current Chancellor). Respondents are Averell Smith, Arlo Hale Smith, Adlai Smith, Brad Sparks, Jimmy Hom, Emily Taylor, Alexa Smith, and Thomas Kistler.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Regents of the University of California, the President of the University, two other high University officials, and the Associated Students of the University of California respectfully pray that a writ of certiorari issue to review the judgment and opinion of the California Supreme Court entered in this case on April 15, 1993.

OPINIONS BELOW

The opinion of the California Supreme Court is published at 4 Cal. 4th 843, 844 P.2d 500, 16 Cal. Rptr. 2d 181 (1993), and reprinted in the separately bound Appendix to this Petition ("Pet. App.") at pages 1a-63a. The order of the California Supreme Court denying Petitioners' petitions for rehearing and modifying its opinion is published at 4 Cal. 4th 1232a and reprinted in the Appendix at pages 64a-66a. The California Supreme Court's opinion affirmed in part and reversed in part the decision of the California Court of Appeal published at 3 Cal. Rptr. 2d 384 (1992), and reprinted in the Appendix at pages 68a-95a. The opinion of the Court of Appeal followed the direction of the California Supreme Court that the Court of Appeal reexamine its first decision in this case in light of *Keller v. State Bar of California*, 496 U.S. 1 (1990). That order of the California Supreme Court is reported at 807 P.2d 1008, 279 Cal. Rptr 779 (1991), and is reprinted in the Appendix at page 96a. The first opinion of the California Court of Appeal is published at 248 Cal. Rptr. 263 (1988), and reprinted in the Appendix at pages 97a-122a. The trial court's statement of decision and judgment were not published. They are reprinted in the Appendix at pages 123a-147a.

JURISDICTION

The California Supreme Court rendered its opinion on Feb. 3, 1993. On April 15, 1993, the court modified its opinion and denied petitions for rehearing. Pet. App. 64a. This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves the First Amendment to the United States Constitution, which provides, in relevant part:

> "Congress shall make no law . . . abridging the freedom of speech . . . ."

STATEMENT OF THE CASE

The University of California at Berkeley requires each student to pay a student activity fee. At the time this case was tried, the fee was $12.50 per quarter. Pet. App. 3a. The University transfers $7.00 from each fee to the Associated Students of the University of California ("the ASUC"), the organization authorized by the University to administer student government and student extra-curricular activities at the Berkeley campus. Originally, payment of the fee entailed automatic membership in the ASUC; however, the ASUC changed its procedures over a decade ago to permit each student to decline membership. Ex. 253b.[1]

The ASUC uses the student activity fee to support both student activities and student government. Pet. App. 3a-4a. Among other things, it provides funds to approximately 150 student activity groups. *Id.* at 4a. Any four students at the University may form such a group and register it with the University. *Id.* All registered groups may, but need not, request funding from the ASUC. Student groups pursue diverse interests, including academic subjects, culture, sports, games, and politics. *Id.* Examples

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[1]Although the disposition of student fee proceeds is handled in the first instance by the ASUC Senate, the University retains ultimate control through a variety of means. Pet. App. 91a. University officials review the ASUC budget, receive the annual independent audit of ASUC finances, and attend all ASUC Senate meetings. *Id.* Moreover, the University's policies give it power to take "action to ensure that any activity under control of student governments is operated in accordance with . . . University policies and procedures . . . ." *Id.*

include the Physics Students Society, the Spanish Club, the Cal Ski Club, and the Chess Club. *Id.* at 5a.

To obtain funding, a student group must obtain approval from the ASUC Senate. *Id.* at 4a. Student groups do not receive lump sum appropriations; instead, approval merely makes the group eligible to receive reimbursement for incurred expenses within eleven categories: (1) personal services, (2) stationery and supplies, (3) telephone, (4) travel, (5) dues and subscriptions, (6) postage, (7) equipment rental, (8) advertising, (9) programs and printing, (10) facilities rental, and (11) other related expenses. Pet. App. 4a-5a, 74a n.8, 103a n.8.

The student groups funded by mandatory fee proceeds include groups devoted to political or ideological goals. When this case was tried, these groups included both proponents and opponents of abortion (Pet. App. 19a), environmental groups, and groups advocating positions on a wide variety of other issues.[2]

The mandatory fee proceeds which the ASUC Senate makes available to student political groups may not be used for off-campus advocacy. Pet. App. 72a. To the contrary, the activities of these groups "are confined to campus," generally consisting of efforts "to educate fellow

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[2]At trial, Respondents objected to the ASUC's funding of fourteen groups: Amnesty International, Berkeley Students for Peace, Campus N.O.W., Campus Abortion Rights Action League, Gay and Lesbian League, Progressive Student Organization, REAP (Radical Education And Action Project), Spartacus Youth League, Students Against Intervention in El Salvador, Students for Economic Democracy, UC Berkeley Feminist Alliance and Women Organized Against Sexual Harassment, UC Sierra Club, Conservation and Natural Resources Organization, and Greenpeace Berkeley. Pet. App. 5a. They did not object to funding Berkeley Right To Life, an anti-abortion group.

The current recipients of student funding are even more diverse. Although current information is not in the record, the groups which received student activity fee proceeds during the 1991-92 academic year included Amnesty International, the Berkeley Ayn Rand Society, and Berkeley Students for Animal Liberation.

students about current issues and to generate debate." *Id.* These student groups "express their views by printing and/or distributing literature, staffing tables at Sproul Plaza [the central campus meeting area and a traditional forum for political advocacy], holding rallies or forums with one or more speakers, [and] showing films . . . ." *Id.* Some groups also "urge political action: they circulate petitions and encourage students to send letters or postcards to government officials." Pet. App. 72a-73a.[3]

With the exception of rules prohibiting the use of mandatory fees for "partisan political activities or any ballot measure" (Pet. App. 19a), or religious services or proselytizing (Pet. App. 74a), the funding of student groups is completely content-neutral. *Id.* The Court of Appeal found that "[t]here is no evidence that funding was approved or denied on account of a group's position on a particular issue" (*id.*) or that "any group had been denied funding on the basis of ideology." Pet. App. 86a. Respondents did not seek review of these determinations in the California Supreme Court, and that court made no finding that any content-based discrimination had occurred.

In addition to using student activity fees to fund academic, cultural, recreational and political groups, the ASUC uses a portion of the fee proceeds to finance its own activities as a student government. The student government includes, inter alia, the ASUC Senate, a democratically elected body of 30 student representatives. Pet. App. 4a. Besides administering student affairs, the ASUC Senate debates and passes resolutions on a wide variety of local, state, national and international issues. *Id.* However, with respect to issues that are not University-related, the ASUC Senate takes no steps to transform its resolutions into public

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[3]The description in text of the student political activities funded by the fee is taken from the second Court of Appeal opinion. Although the California Supreme Court disagreed with the legal conclusion reached in this opinion, nothing in the California Supreme Court's opinion contradicts this description of the political activity at issue in this case.

policy, except for occasionally publicizing its resolutions on the Berkeley campus. That is because University regulations bar the use of mandatory fee proceeds to support positions taken by the ASUC Senate "except for University-related purposes." Pet. App. 72a.

Proceeds from the student activity fee are also used to support lobbying efforts by two groups affiliated with the ASUC: the University of California Lobby and the ASUC Municipal Lobby. Pet. App. 4a. University policies permit student governments to lobby at all levels of government, but only on University-related issues. Pet. App. 77a, 134a. The University of California Lobby has lobbied the State Legislature in favor of using registration fees to fund abortions, against budget cuts for the University, and in favor of mandatory student fees. Pet. App. 76a-77a. The ASUC Municipal Lobby has lobbied the City of Berkeley on public transportation fares, zoning and rent control, and has endorsed student candidates for municipal appointive office. Pet. App. 5a, 77a.[4]

This case began in 1979 when four of the Respondents filed suit in California Superior Court challenging the Regents' collection and use of the student activity fee as a violation of the First Amendment and various California constitutional provisions and statutes. Pet. App. 5a-6a. A

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[4]The majority opinion below states that the Municipal Lobby lobbied on issues unrelated to the University such as the City of Berkeley's investment policy and a nuclear freeze initiative. Pet. App. 4a, 24a. This is only half right. The Student Lobby did not take a position on the nuclear freeze; all it did was hold an on-campus forum on the issue, with both sides represented. RT ("Reporter's Transcript") 363-64. Similarly, the Municipal Lobby did not take a position on divestment (RT 438), although it apparently mediated between competing groups in some unspecified fashion to help put the initiative on the ballot. RT 439. This latter example therefore may have been one of the "isolated instances" referred to by the trial court in which University policies were violated. *See* Pet. App. 129a. Since Petitioners do not argue for the right to conduct lobbying with mandatory fees on issues unrelated to the University or its students, the resolution of this factual issue is irrelevant to this Petition.

year later, the other Respondents filed individual actions in small claims court raising the same issues. Pet. App. 6a. Petitioner ASUC then filed an action in Superior Court to enjoin the small claims court proceedings and obtain a declaration that the fee was constitutionally imposed and used. Pet. App. 69a. All these actions were subsequently consolidated. Pet. App. 6a.[5]

These cases were tried in 1982. Following trial, the Superior Court rendered a statement of decision and judgment in favor of Petitioners. Pet. App. 123a-147a. On appeal, the California Court of Appeal affirmed. Pet. App. 97a-122a. Respondents then filed a petition for review with the California Supreme Court. That court granted review but deferred a ruling pending this Court's decision in *Keller v. State Bar of California*, 496 U.S. 1 (1990). After *Keller* was decided, the California Supreme Court instructed the Court of Appeal to vacate its prior decision and reconsider the matter in light of *Keller*. Pet. App. 96a. The Court of Appeal again affirmed the trial court's judgment. Pet. App. 68a-95a. Respondents again sought review in the California Supreme Court. The Court granted their petition for review and, by a 5-2 vote, reversed the Court of Appeal's decision. Pet. App. 1a-63a.

Relying on *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), the court held that Petitioners had to show that their use of the student activity fee to fund political and ideological speech served a compelling state interest "that cannot be achieved through means less restrictive of associational freedoms." Pet. App. 10a (citing 475 U.S. at 303 n.11 (internal citation omitted)). The court then used this standard to compel Petitioners to identify and cease funding

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[5]Although Respondents continued to raise various state law claims throughout the course of this litigation, the claims were rejected by the California Court of Appeal. Pet. App. 90a-94a. The California Supreme Court expressly declined to reach any of Respondents' claims other than those based on the First Amendment. Pet. App. 8a n.7, 30a. The decision below therefore cannot be sustained on any non-federal ground.

with mandatory fees those student groups whose political and ideological goals "outweigh" the educational benefits they provide:

> "[A] group's dedication to achieving its political or ideological goals, at some point, begins to outweigh any legitimate claim it may have to be educating students on the University's behalf. To fund such a group through mandatory fees will usually constitute more of a burden on dissenting students' speech and associational rights than is necessary to achieve any significant educational goal. The University can teach civics in other ways that involve a lesser burden on those rights or no burden at all." (Pet. App. 12a)[6]

The majority opinion thus requires Petitioners "to identify any groups that are ineligible for mandatory funding" under this vague and imprecise standard and to "offer students the option of deducting a corresponding amount from the mandatory fee." Pet. App. 22a. Students who disagree with Petitioners' calculation must be given the full panoply of procedural remedies recognized in *Keller*: "an adequate explanation of the basis of the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.* (citation omitted).

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[6] The majority opinion also criticized Petitioners for distinguishing between partisan activity and other political expression, stating that this distinction "borders on the absurd." Pet. App. 21a. In fact, however, the distinction between partisan political activity and other forms of political expression has been specifically upheld by this Court. *Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548, 575-80 (1973).

The majority opinion also prohibits Petitioners from using mandatory fee proceeds for lobbying, even on student- or university-related issues. Pet. App. 23a-27a. While it acknowledged that union dissenters may be compelled to support lobbying directly related to the union's collective bargaining responsibilities (*Lehnert v. Ferris Faculty Ass'n*, --U.S.--, 114 L. Ed. 2d 572, 590 (1991)), the court held that the ASUC, unlike a union, is not charged by State law with bargaining on behalf of its membership. Hence, the court found that Petitioners' only rationale for funding lobbying was educational. Pet. App. 27a. The court found this rationale insufficient, as it concluded that the University's educational mission could not justify providing "educational benefit to a few student lobbyists." *Id.* The decision below thus requires a check-off and refund procedure for lobbying expenses, as well as for the expenses of "political" and "ideological" groups.

With respect to the ASUC's own political activities, the court remanded Respondents' claims for further consideration of two issues. First, the court noted a disagreement in the record as to whether these activities had been funded by mandatory fees, and ordered the lower courts to make that determination. Pet. App. 28a-30a. Second, the court instructed the lower courts that, if mandatory fees had been used to fund these activities, this funding was subject to the same "strict scrutiny" the court applied to funding other student political activity. Pet. App. 29a-30a.

Although it agreed with the majority opinion that funding lobbying with mandatory fees is impermissible, the dissenting opinion below greeted every other point made by the majority with stinging criticism. It accused the majority of misreading the opinions of this Court (Pet. App. 31a), rendering a decision inconsistent with "*unanimous* state and federal case law" (*id.* (emphasis in original)), paying insufficient deference to the Regents' educational judgment that student groups "help contribute to the mission of the University" (Pet. App. 32a), and applying the wrong constitutional standard. Pet. App. 41a-42a. Instead of

resting its holding "on a spurious and ill-defined distinction between 'educationally beneficial' and 'ideological' speech" (Pet. App. 31a), the dissent would have followed the Second Circuit's opinion in *Carroll v. Blinken*, 957 F.2d 991 (2d Cir.), *cert. denied*, --U.S.--, 121 L. Ed. 2d 224 (1992), and permitted mandatory fees to be used for on-campus political speech by students, while prohibiting such fees from being used for off-campus speech. The dissent underscored its disagreement with the majority by stating that "the majority's holding . . . represents such a radical departure from educational reality and settled law . . . that I urge the University to petition . . . for certiorari and [the] high court to grant review." Pet. App. 34a-35a.

REASONS FOR GRANTING THE WRIT

I.

THE CALIFORNIA SUPREME COURT'S HOLDING THAT A STATE UNIVERSITY CANNOT FUND STUDENT POLITICAL GROUPS IN A CONTENT-NEUTRAL MANNER WITH MANDATORY STUDENT ACTIVITY FEES ERRONEOUSLY DECIDES AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW AND CONFLICTS WITH BOTH THE SECOND CIRCUIT'S DECISION IN *CARROLL V. BLINKEN* AND NUMEROUS OTHER STATE AND FEDERAL CASES.

The decision below is in direct conflict with the Second Circuit's decision in *Carroll v. Blinken*, 957 F.2d 991 (2d Cir.), *cert. denied*, --U.S.--, 121 L. Ed. 2d 224 (1992). The decision is also irreconcilable with numerous other state and federal decisions that have rejected constitutional challenges to the use of mandatory student fees to create on-campus fora for political speech. This conflict concerns an important and recurring issue of constitutional law that the California Supreme Court decided erroneously.

A. The Decision Below Conflicts With *Carroll v. Blinken* And With Numerous Other State And Federal Decisions Upholding The Use Of Mandatory Student Fees To Create On-Campus Fora For Political Speech.

1. The decision below conflicts with *Carroll v. Blinken*. Although the majority below attempted to minimize the extent of the conflict, the two decisions identify the competing constitutional interests at stake differently, and weigh those interests according to different standards of judicial review. Not surprisingly, the two decisions reach diametrically opposite results.

Carroll v. Blinken involved a challenge to the use of a mandatory student activity fee levied by the State University of New York at Albany ("SUNY Albany") to fund the New York Public Interest Research Group ("NYPIRG"). NYPIRG, which the Second Circuit characterized as "an ideological organization" (957 F.2d at 994), used a portion of the fee proceeds to pay for a wide variety of on-campus and off-campus political activities. On-campus, NYPIRG sponsored forums, symposia and debates on selected national and international political issues (such as the arms race and health care), studied issues of concern to the student community (such as the state of the lighting in campus parking lots, the use of irradiated food on campus, and area bank policies on student credit cards), conducted similar research on off-campus issues (such as the divesture of state money from private institutions doing business in South Africa and nuclear power issues), and participated in projects such as small claims court assistance, local toxic waste cleanups, and voter registration drives. *Id.* Off-campus, NYPIRG employed numerous full-time professional staff members and lobbied state legislators and executive officials. *Id.* The students who challenged these expenditures alleged that they "strongly opposed" NYPIRG's political activity and sought to prevent their fees from being used to support that organization. *Id.* at 995.

Like the majority below, the *Carroll* court stated that using mandatory fees to fund student political activity burdens the dissenters' First Amendment rights. *Id.* at 999 ("[A]ppellants' right to be free from compelled speech suffers when NYPIRG uses student funds to raise issues on campus, organize the community and lobby the legislature in pursuit of 'economic and social injustice'"). But the Second Circuit's analysis of the interests justifying this burden was quite different than that of the decision below.

The *Carroll* court identified three separate interests which together justify use of a mandatory fee to fund NYPIRG's on-campus political activity: "the general promotion of extracurricular activities," "the facilitation of . . . 'participatory civics training,'" and "the stimulation of robust campus debate on a variety of public issues." *Id.* The court recognized that student political activity "enrich[es] the overall extracurricular lives of students" (*id.* at 1000) and gives students "a sense of civic activism and responsibility." *Id.* In contrast, the majority opinion below contains no analysis of these interests, beyond a grudging acknowledgement that some unspecified amount of on-campus political activity is "germane" to education (Pet. App. 12a, 18a), and a disparaging reference to the educational interests served by such activity as merely an attempt to "teach civics." Pet. App. 12a. Similarly, while *Carroll* recognized that using the mandatory student activity fee for on-campus political speech "create[s] a forum for the expression of diverse views" (957 F.2d at 1001), the decision below rejected Petitioners' contention that funding student political speech through mandatory fees is justified because it creates a public forum. *See* Pet. App. 13a n.8; *see* pp. 17-18, *infra*.[7]

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[7]Like the *Carroll* court, this Court has often recognized the role that extra-curricular activities play in education. For example, this Court said in *Bethel School Dist. v. Fraser*, 478 U.S. 675 (1986), that "[t]he process of educating our youth for citizenship . . . is not confined to books, the curriculum, and the civics class . . . ." *Id.* at 683. Similarly, Justice Stevens

(continued...)

Carroll also refuses to draw any distinction between "educationally beneficial" and "ideological" speech. Indeed, the *Carroll* court explicitly recognized that on-campus political speech furthers the university's educational mission:

> "SUNY Albany's interest in sponsoring and maintaining a thriving campus forum of vigorous advocacy and political action is itself a concern of constitutional dimensions, since a central purpose of the First Amendment is to guarantee the free interchange of views and energetic debate. This constitutional interest is no less forceful or applicable on campus than it is in the community at large. A university where NYPIRG petitions against nuclear power, where environmental groups advocate greater recycling, where opponents of South Africa debate opponents of divestment, and partisans of a dozen other causes press their cases is a university fulfilling its traditional mission in a free society." (957 F.2d at 1001 (citations omitted))

In contrast, the decision below forces the Regents to make the distinction rejected in *Carroll*, and analyze whether the "political" or "ideological" content of *each* group's activities

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[7](...continued)
stated, in his concurring opinion in *Widmar v. Vincent* that extra-curricular activities "are a critical aspect of campus life" (454 U.S. at 279 n.2 (Stevens, J., concurring in the judgment)), while Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), stressed the importance of informal education in exposing students to diverse ideas. *Id.* at 312-13 & n.48 (opinion of Powell, J.). Yet the majority opinion below ignored these precedents and slighted the role that extra-curricular activities play in providing a university education.

"outweighs" the activities' educational value. Pet. App. 12a.[8]

Having thus identified the interests justifying using mandatory student fees to fund student political activity, the *Carroll* court then balanced those interests against the plaintiffs' First Amendment claims. Unlike the majority opinion below, the Second Circuit did not invoke "strict scrutiny" by demanding that the university show a "compelling state interest" to justify imposing the fee. *Compare* Pet. App. 10a. Instead, the *Carroll* court upheld the fee on a finding that the university's interests were "substantial enough to justify the infringement of appellants' First Amendment right against compelled speech that occurs when SUNY Albany transfers a portion of the activity fee to NYPIRG." 957 F.2d at 1001. Similarly, the *Carroll* court did not require the university to show that the interests justifying the fee could not be achieved "through means significantly less restrictive of associational freedoms." *See* Pet. App. 10a. Instead, because the university was seeking "to expand campus speech by facilitating the activities of a wide

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[8]*Carroll* and the decision below also differ in the degree of deference given by the court to the expert judgments of university administrators regarding the importance of extracurricular activities to the university's educational mission. In "scrutinizing the substantiality of SUNY Albany's interest in funding NYPIRG with student activity fees," *Carroll* gives universities "wide latitude . . . to define and carry out their own education missions." 957 F.2d at 999. In contrast, the majority opinion below accords little or no weight to the University of California's judgment that funding on-campus political activity "gives students a chance to express their views on campus, to participate in campus administrative positions, to provide self-education in government processes, to develop social skills, [and] to inform the student body about a variety of issues . . . ." Pet. App. 11a.

In his concurring opinion in *Widmar v. Vincent*, Justice Stevens stated that judgments concerning the educational value of extracurricular activities "should be made by academicians, not by . . . judges, and their standards for decision should not be encumbered with ambiguous phrases like 'compelling state interest.'" 454 U.S. at 278-79 (Stevens, J., concurring in the judgment) (footnote omitted). The majority opinion below obviously failed to follow this principle.

variety of speakers" on a "content-neutral" basis (957 F.2d at 999), the Second Circuit invoked the First Amendment standard applied in *United States v. Albertini*, 472 U.S. 675 (1985), and asked only whether the university's interests "would be served less effectively absent the activity fee distribution regulation." 957 F.2d at 1001 (emphasis added).

These differing standards led to different—and opposite—results. The *Carroll* court found that imposing the fee was necessary to further the ability of student political groups to engage in on-campus expressive activity:

> "Clearly the ability of NYPIRG and other campus groups to function effectively is tied to the level of resources they can muster in support of their activities. Of equal importance is the stability and predictability the fee scheme provides; established organizations like NYPIRG that receive repeated Student Association backing can estimate their yearly funding with some accuracy and expect a steady annual flow of money. Viewed from the students' perspective, an alternate funding scheme would seem less likely to commit the university community to the goals of enriching campus life in promoting debate. Rather, funding would be balkanized and students would cease to be linked by a common bond to the tolerant support of all points of view." (*Id.* at 1001-02)

In contrast, the majority opinion in the California Supreme Court baldly asserted that "[t]he University can teach civics in other ways that involve a lesser burden on [dissenters' First Amendment] rights, or no burden at all." Pet. App. 12a. Yet it did not identify those ways, or examine how the University might achieve its goal of

promoting the diverse expression of on-campus opinion without imposing a mandatory fee.

Carroll and the decision below thus reach contrary conclusions as to whether a mandatory student activity fee can be used to fund on-campus political activity. Although it restricted the use of mandatory fees for activities unrelated to the SUNY Albany campus,[9] the *Carroll* court holds that mandatory student activity fees may be used to fund the on-campus political activity of an entity which the court itself described as "an ideological organization." *Id.* at 994. Indeed, under the regulation at issue in *Carroll*, the university funded precisely the same kind of groups whose funding Respondents have challenged in this case. *See* 957 F.2d at 993 (groups funded at SUNY Albany included Revisionist Zionist Alliance, Feminist Alliance, Gay and Lesbian Alliance, and Amnesty International). In contrast, under the decision below, the University must differentiate between groups engaged in on-campus political speech, and use proceeds of the mandatory fee to fund only those groups which provide educational benefits that "outweigh" the group's dedication to its "political" or "ideological" goals. Pet. App. 12a.[10]

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[9]*Carroll* held that the educational interests asserted by the university did not justify funding NYPIRG's speech away from the Albany campus, since that speech did not benefit SUNY Albany students. 957 F.2d at 1002. Accordingly, the court ordered NYPIRG to collect no more from students at SUNY Albany than it spent on activities related to that campus. *Id.* In contrast, the decision below holds that such earmarking is not a constitutionally permissible remedy (Pet. App. 29a), and requires Petitioners to institute a check-off and a *Hudson*-type refund procedure for the mandatory fee uses that it finds impermissible. Pet. App. 22a-23a, 27a.

[10]The majority opinion below attempts to cloak the extent of its disagreement with *Carroll* by intimating that that decision turned on the Second Circuit's evaluation of the educational benefits provided by NYPIRG's on-campus activities, thus implying that the Second Circuit might have reached a different result had it been faced with a challenge to the use of mandatory fee proceeds by another group whose activities

(continued...)

If the decision below stands, the legal standards governing use of mandatory student activity fees in the state universities of the Nation's two largest states will be governed by different rules, procedures, and remedies. This clear conflict should be resolved by this Court.

2. Numerous decisions other than *Carroll*, by both the supreme courts of several states and the federal Courts of Appeals, explicitly permit the use of mandatory student fees to pay for on-campus political expression.[11] These

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[10](...continued)
were less "educational" and more "ideological." *See* Pet. App. 14a ("the court found that NYPIRG offered benefits on campus that were 'substantial enough to justify the infringement . . .'"). As the dissent below noted (Pet. App. 53a n.9), the majority's attempt to distinguish *Carroll* will not wash. "[T]he Court of Appeal in *Carroll* did not premise its holding on the fact that NYPIRG promoted 'educational' rather than 'ideological' causes. On the contrary, the *Carroll* court recognized that despite its self-description as 'non-partisan' NYPIRG pursued clearly political ends, as did the 'partisans of a dozen other causes' on campus." *Id.* (quoting 957 F.2d at 1001). Indeed, as noted in text, the Second Circuit in *Carroll* explicitly referred to NYPIRG as "an ideological organization." 957 F.2d at 994.

The majority opinion below also attempted to show that the strict scrutiny it invoked was similar to the test invoked by the Second Circuit in *Carroll*. Pet. App. 14a-15a. Here, too, the opinion's attempt to minimize its conflict with *Carroll* is unavailing. *Carroll* applied the standard set forth in *United States v. Albertini*, 472 U.S. 675 (1985), which in turn is derived from *United States v. O'Brien*, 391 U.S. 367 (1968). The Court has held that the O'Brien test . . . "is little, if any, different from the standard applied to time, place, or manner restrictions" (*Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984)), and that standard, unlike "strict scrutiny," contains no "less restrictive alternative" criterion. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) ("a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's interests, but . . . it need not be the least restrictive or least intrusive means of doing so").

[11]*Hays County Guardian v. Supple*, 969 F.2d 111, 122-24 (5th Cir. 1992), *cert. denied*, –U.S.–, 122 L. Ed. 2d 371 (1993) (upholding use of mandatory student fees to subsidize student newspaper); *Kania v. Fordham*, 702 F.2d 475, 479-80 (4th Cir. 1983) (same); *Larson v. Board of*
(continued...)

cases recognize that a university may use mandatory student fees to "create[] a forum for . . . uninhibited and vigorous discussion on matters of campus and public concern" because creating such a forum "advances a central purpose of the University." *Hays County Guardian*, 969 F.2d at 123; *accord*, *Kania*, 702 F.2d at 477; *Larson v. Board of Regents*, 204 N.W.2d at 570-71; *Lace v. University of Vermont*, 303 A.2d at 478 ("the student association funds provide the monetary platform for various and divergent student organizations to inject a spectrum of ideas into the campus community").

The majority below recognized that these cases "uphold[] the use of mandatory fees to create public fora," but concluded that they "offer little assistance in resolving this case." Pet. App. 13a n.8. That is so, the majority said, because "[n]o one argues that any of the student groups involved in the case before us is a public forum. To the contrary, the record clearly demonstrates that each is expressly devoted to advancing its own political and ideological causes." *Id.*

The majority's dismissal of these cases misconceives what a public forum is. An individual group that receives funding from the student activity fee is not itself a public forum. But neither is a speaker who mounts a Hyde Park soap-box. In that context, the portion of the park devoted to political activity is the public forum. By the same token, in this context the public forum is the "financial

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[11](...continued)
Regents, 204 N.W.2d 568, 570-71 (Neb. 1973) (upholding the use of mandatory fees to support both a student newspaper and a student speaker program); *Lace v. University of Vermont*, 303 A.2d 475, 479-80 (Vt. 1973) (rejecting a challenge to the use of mandatory student fees to fund a student newspaper, speaker's bureau, films, and sending student body president to a national student conference); *see also Veed v. Schwartzkopf*, 353 F. Supp. 149, 152 (D. Neb.), *aff'd*, 478 F.2d 1407 (8th Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974) (rejecting constitutional challenge to the use of mandatory student fees to subsidize a student newspaper, a student association, and a speaker's program).

space" that the University has made available for student political expression.[12] Thus, the conclusion in *Hays County Guardian*, *Kania*, *Larson*, and *Lace* that mandatory fees may be used to subsidize a state university's creation of a public forum conflicts in principle with the decision below.

These public forum cases cannot be distinguished on the ground that they primarily concern funding student newspapers and speakers bureaus, rather than student political groups. As the Court of Appeals in *Kania* found, a student newspaper is a public forum because it "exposes 'the student body to various points of view on significant issues, and [allows] students to express themselves on those issues.'" 702 F.2d at 477 (citation omitted). Precisely the same is true for student political groups. As the California Court of Appeal recognized in this case, "the funding of the student groups promotes free expression by providing a forum for the exchange of ideas and the advocacy of divergent views." Pet. App. 114a; *see also* Pet. App. 86a. Indeed, the Fifth Circuit recently relied on *Carroll v. Blinken*'s public forum rationale in upholding funding of a

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[12]A public forum does not need to have a physical situs. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 801 (1985). In *Cornelius*, the Court decided that the Combined Federal Campaign, a charity drive for federal employees, was the public forum, rather than the federal workplace in which the campaign occurred. *Id.* Similarly, in this case, the "public forum" has been created by the University's decision to devote a portion of the student activity fee to subsidizing speech, including political speech.

This conclusion breaks no new ground. In *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court "found that a State University that had an express policy of making its meeting facilities available to registered student groups had created a public forum for their use." *Cornelius*, 473 U.S. at 802. Logically the same result follows if a university, instead of making meeting facilities available to student groups, provides the student groups with funds by which they can rent such facilities.

student newspaper through mandatory fees. *Hays County Guardian*, 969 F.2d at 123.[13]

The majority opinion below was wrong to reject the public forum holdings of cases such as *Hays County Guardian*, *Kania*, *Larson*, and *Lace*. Similarly, the decision below should have followed *Carroll v. Blinken*'s analysis of the educational interests served by funding student political groups, the importance of those interests to the University's educational mission, and whether those interests would be equally well served without funding on-campus student activity. This Court should grant certiorari to resolve the conflicts between the decision below and these cases.[14]

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[13]Moreover, the public forum rationale adopted by *Hays County Guardian*, *Kania*, *Larson*, and *Lace* is a better justification for funding student political groups than it is for funding a student newspaper. While the political groups funded by a student activity fee at a campus such as Berkeley will inevitably express opinions regarding a wide variety of issues from a multitude of viewpoints, a student newspaper may simply reflect the political and journalistic biases of its editors.

[14]In support of its holding, the majority below cited the Third Circuit's decision in *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986). However, that case "does not address the problem presented by a state university's allocation of a mandatory, non-refundable student activity fee" or whether a political or ideological student group "may be funded through the general activities fund as are other campus organizations representing diverse views." *Id.* at 1064. The fee invalidated in *Galda*, over a strong dissent, was a separate fee earmarked for a single organization "primarily devoted to changing conditions outside the University." *Id.* at 1065. In this situation, the court held that the University's justification for imposing a general activities fee–presenting a variety of ideas–did not apply. *Id.* at 1067. Even the majority below acknowledged, however, that "there is language in *Galda* suggesting that the mandatory funding of political groups might be acceptable if accomplished through a content-neutral process in which all groups on campus were free to compete . . . ." Pet. App. 17a. That is precisely the situation presented by this case.

B. The Decision Below Decides An Important Issue Of Constitutional Law In Conflict With The Decisions Of This Court.

This Court has never decided whether and how the principles set forth in *Abood v. Board of Education* and *Keller v. State Bar of California* apply in the context of a state university. That issue is an important one, which should be resolved by this Court.

1. As *Carroll* and the numerous other cases dealing with this subject indicate (*see* pp. 16-17, *supra*), public universities throughout the country provide support for on-campus political expression through the use of mandatory fees. The decision below threatens to bring that practice to a screeching halt. That decision gives each and every student the right to require that any disfavored group submit to a lengthy administrative proceeding to adjudicate whether its activities are more "ideological" than "educational," even though there may be dozens of such groups (whose activities may change from one year to the next) and even though the amount in controversy for each individual student will be no more than pennies. Because few universities will want to undertake this burden, as a practical matter the decision below sounds the death knell for using mandatory fees to create a forum for on-campus political expression.

2. No constitutional imperative requires so drastic a change in the collection and use of mandatory student fees. In applying *Abood* and *Keller* mechanically to this case, the court's majority opinion slights the differences between public universities, on the one hand, and labor unions and integrated bars, on the other. Labor unions play a defined role in a limited arena—the collective bargaining process—while integrated bars provide "specialized professional advice to those with the ultimate responsibility of governing the legal profession." *Keller*, 496 U.S. at 13. In contrast, a university exists to educate its students by, among other things, creating a "marketplace of ideas." Accordingly, a

university, unlike a labor union or integrated bar, is a public forum, at least for its students. *Widmar*, 454 U.S. at 267 n.5.

In both the agency fee cases and *Keller*, moreover, the compulsory fees or dues were being used to amplify only a single voice—that of the union in the agency fee cases and the State Bar in *Keller*. In such situations, dissenters have a cognizable First Amendment interest in not having their funds extracted to support a specific point of view with which they disagree.

In this case, by contrast, no such interests exist. The University does not compel the payment of student fees to support a single organization with a single point of view. To the contrary, Petitioners are indifferent as to whether the student activity fees are used to support any particular viewpoint. Indeed, as the abortion example indicates, fees are available to groups representing diametrically opposed points of view on the same issue. *See* p. 3, *supra*. Fee proceeds are available to such groups not because of any governmental purpose to enhance their particular parochial interests, but simply because these groups have sought to benefit from a content-neutral policy to make such fees available to all student groups.[15]

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[15]The failure of the decision below to recognize that funding diverse political views in and of itself furthers the University's educational mission warps the majority's constitutional analysis. For example, the majority opinion below objects to the fact that "students who favor abortion rights must pay to support the political activities of Berkeley Right to Life, a group opposed to abortion, [while] students opposed to abortion must subsidize groups such as Campus N.O.W. and Campus Abortion Rights Action League, which favor abortion rights." Pet. App. 19a. But the majority seems not to have noticed that encouraging an ongoing debate on the abortion issue by providing funds to such disparate points of view enhances the educational opportunities available to university students and thus benefits them all, regardless of what position they take on the abortion controversy. Since all students benefit from enhanced debate on this and other issues, all may be charged for it. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 221-22 (1977) (agency fee may be justified by removing the incentives employees would other-

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Abood and its progeny have never been applied when the government creates a public forum. That is so for good reason. Whenever the government creates a forum for expressive activity, and makes that forum open to part or all of the public on a content-neutral basis, views will be expressed which some find objectionable. Yet that fact does not give such individuals the right to prevent the government from using their money to create a public forum. For example, in *Buckley v. Valeo*, 424 U.S. 1 (1976), plaintiffs claimed that public financing of Presidential campaigns involved a "compulsion upon individuals to finance the dissemination of ideas with which they disagree[d]." *Id.* at 91 n.124. However, the Court summarily rejected this argument, holding in a single sentence that "[t]he scheme involve[d] no compulsion." *Id.*[16] Consequently, no citizen forced to subsidize a Hyde Park Speakers' Corner could refuse to contribute on the ground that he or she disagreed with some of the speeches made from the park's soapbox. Respondents stand in no better position.[17]

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[15](...continued)
wise have to become "free riders"). If the law were otherwise, any student could take advantage of the diversity of political viewpoints expressed on a university campus without being compelled to pay the cost of providing such a public forum.

[16]The Court could have relied on the voluntariness of the taxpayer check-off to the election financing fund to conclude that "no compulsion" existed. But it did not do so. Instead, the Court made clear that its conclusion would have been the same had the election financing been appropriated by Congress out of general revenues. "The . . . check-off is simply the means by which Congress determines the amount of its appropriation." *Id.*

[17]Two Courts of Appeals have held that the constitutional burden on dissenters' First Amendment rights is not lessened by the fact that they are forced to contribute to a variety of groups. *Carroll*, 957 F.2d at 998; *Galda v. Rutgers*, 772 F.2d at 1067. But none of these cases attempt to square this holding with the public forum analysis presented above.

3. Even if *Abood* applies, the majority opinion below unjustifiably increased the burden which Petitioners had to carry in order to justify using the student activity fee for student political activities. This Court has never expressly articulated the standard that applies to a substantive claim that fees are being imposed unconstitutionally. Since the decision below and *Carroll v. Blinken* conflict on just this point (*see* pp. 13-14, *supra*), this case provides an excellent opportunity to decide this issue once and for all.

Such guidance as the Court has provided, however, indicates that the California Supreme Court was quite wrong in applying "strict scrutiny." *Abood* and *Keller* state only that the governmental interests furthered by a compulsory fee be "important" (*Abood*, 431 U.S. at 222, 225) or "substantial" (*Keller*, 496 U.S. at 13), not "compelling," as "strict scrutiny" requires. Similarly, and of even greater importance, neither *Abood* nor the other agency shop cases nor *Keller* requires a showing that no less onerous alternatives exist to imposing a mandatory fee; instead, they require only that expenditure of the mandatory fee be "necessarily *or reasonably incurred* for the purpose of" effectuating the interests for which the fee is adopted. *Keller*, 495 U.S. at 14 (emphasis added). As the Second Circuit held in *Carroll v. Blinken*, this test can be met simply by showing that these interests "would be served less effectively absent the activity fee distribution . . . ." 957 F.2d at 1001. It does not require the defendant to show that there are no conceivable alternatives to the challenged policy that could be envisioned after the fact by a creative judge. *See* note 10, *supra*.[18]

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[18]In invoking strict scrutiny, the majority opinion below cited *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986). But that case deals only with the procedure necessary to protect dissenters' rights once a court has found that mandatory fees are being used for unconstitutional purposes. It does not deal with the standard of review necessary to determine whether a violation of the constitution exists in the first instance.

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4. Moreover, the standard adopted by the majority below for distinguishing between groups that may be funded with mandatory fees and groups whose funding is impermissible subverts the very constitutional provision it purports to protect. Once a university creates a public forum, it may not deny access to that forum on the basis of a student group's political ideas. *Healy v. James*, 408 U.S. 169, 187-88 (1972). For that reason, the lower federal courts have prohibited universities from denying funding to student political groups because of the views they express. *Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361, 367 (8th Cir. 1988). Yet the majority opinion below requires the university and the courts to make such content-based determinations in order to distinguish between permissible and impermissible recipients of mandatory fees.

The intrusive inquiry mandated by the decision below cannot be justified on the ground that *Abood* and its progeny require such content-based determinations. In those cases, the Court has distinguished between speech that can be funded with compelled fees and speech that may not be so funded on the basis of the speech's subject matter. *See, e.g., Keller*, 496 U.S. at 15-16; *Ellis v. Railway Clerks*, 466 U.S. 435, 450-51 (1984). In such cases, the Court compares the subject matter of the proposed speech with the purposes for which the compelled fee is levied to see if the latter justifies the former. That determination does *not* turn on the speech's viewpoint, the manner in which the

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[18](...continued)
Moreover, to the extent *Hudson* assumes that a requirement of "narrow tailoring" subsumes a "less restrictive alternative analysis" (*id.* at 303 & n.11), it has been overtaken by the Court's subsequent holding in *Ward v. Rock Against Racism* that a requirement of "narrow tailoring" and "strict scrutiny" are not the same. *See* note 10, *supra*.

communication addresses the particular subject matter, or the subjective value of the proposed speech.[19]

That determination is leagues apart from the wholly subjective inquiries mandated by the decision below. In attempting to determine precisely when a "group's dedication to achieving its political or ideological goals . . . begins to outweigh any legitimate claim it may have to be educating students on the University's behalf" (Pet. App. 12a), the Regents and the courts will inevitably have to make determinations that are guided neither by objective criteria nor by subjective standards that are judicially or administratively manageable. Will Petitioners have to make individual judgments concerning the educational vs. ideological content of each movie presented by a student group? Will they have to make similar judgments for forums, leaflets, and rallies? Such inquires are the logical—indeed, the inevitable—result of the California Supreme Court's majority opinion. *See* Pet. App. 33a, 46a.

This Court's cases forbid Petitioners from making such distinctions. Because both the tract and the treatise contribute to political debate, the First Amendment protects "'vigorous advocacy' no less than 'abstract discussion.'" *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964). Consequently, the decision errs in compelling Petitioners to distinguish between the two, in the context of a dedicated public forum, for each political group that receives student activity fee funding. The Court should grant review to correct the errors in the decision below and prevent Respondents' misuse of the First Amendment from impairing the

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[19]For example, under *Keller*, the State Bar of California may not use mandatory bar dues to take a position on a gun control or nuclear freeze initiative regardless of whether it supports or opposes the particular initiative in question. Conversely, under *Ellis v. Railway Clerks*, a labor union may use compelled dues to defray the expenses of running newspaper articles about collective bargaining, strikes, negotiations, etc., no matter how one-sided, tendentious, or inflammatory is its treatment of these subjects. *Id.* at 450-51.

University's ability to create a public forum that it believes is vital to fulfilling its educational mission.

II.

THE CALIFORNIA SUPREME COURT'S HOLDING THAT MANDATORY FEE PROCEEDS MAY NOT BE USED TO SUPPORT POLITICAL SPEECH BY A STUDENT GOVERNMENT ERRONEOUSLY DECIDES AN IMPORTANT ISSUE OF LAW.

The California Supreme Court held that mandatory fee proceeds may not be used to support the ASUC's own political activities unless such funding satisfies strict scrutiny. Pet. App. 30a. But the ASUC Senate is constitutionally indistinguishable from the other groups whose funding is discussed in Part I. Like them, it is a voluntary student association. Like them, it takes positions on university-related, local, state and national issues. And like them, it is funded through the student activity fee to further the University's educational mission. The reasons given in Part I why the Court should grant review of the "student groups" issue are equally applicable to the "ASUC Senate" issue.

Petitioners believe that "student government [is] an important part of the university's educational function in that it serves to teach students about government; it enables students to participate in governmental decision-making; and it exposes students to the presentation of diverse views." Pet. App. 72a. This belief is not unique to the University of California; indeed, Chief Justice Burger has written that "[p]art of the educational experience of every college student should be an experience in responsible self-government . . . ." *Healy v. James*, 408 U.S. 169, 195 (1972) (Burger, C.J., concurring). Providing such an experience is a substantial—indeed, a compelling—governmental interest. *Cf. Regents of the University of California v. Bakke*, 438 U.S. at 313 (Powell, J.) ("it is not too much to say that the 'nation's future depends upon leaders trained through wide

exposure' to the ideas and mores of students as diverse as this Nation of many peoples").[20]

For these reasons, student governments are a familiar part of the American university landscape. But few such governments are financially self-sufficient. Most depend on some form of subsidy by the university: either a mandatory student activity fee or the provision of meeting and office space, telephones, printing, etc. Under the decision below, such support will become constitutionally suspect the minute a student government ventures into the "political" arena. The end result is obvious: political debate will be inhibited, not encouraged.[21]

The First Amendment does not require this result. Fostering the expression of political views by a democratically elected student government unquestionably is germane to the University's educational mission. Moreover, the incremental burden on Respondents is minimal.

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[20]The majority below grudgingly acknowledges that "the ASUC Senate's practices of taking and publicizing positions on political issues may have educational value for those few students who are involved." Pet. App. 28a. But the debating and passing of a resolution may promote discussion and debate throughout the campus at large. Moreover, most curricular or extra-curricular activities, such as a particular class or student group, directly benefit only a small minority of the thousands of students at a large university like Berkeley. Yet that does not diminish the educational value of such activities.

[21]The majority's holding that the ASUC Senate must satisfy strict scrutiny whenever it uses funds for political speech is not limited to speech that is unrelated to University issues. For that reason, the decision below will inhibit student governments from taking positions on any university-related issue that might arguably be deemed "political," such as whether universities should divest from (or reinvest in) South Africa, whether campuses should adopt "hate speech" codes, etc. Such an inhibition deprives student government of a central purpose for existence. Moreover, the university itself—as opposed to its students—has an obvious interest in providing an organized and democratic means for the expression of student views on university-related issues. *See* RT 950-51, 1066-67. This ensures that students will not need to engage in disruptive behavior to make their voices heard. RT 1067.

They may be compelled to pay the cost of creating a public forum for expressive activities through a mandatory student activity fee. *See* Part I(B), *supra*. Funding political expression by one additional group—the ASUC Senate—does not significantly add to their burden.[22]

III.

THE CALIFORNIA SUPREME COURT'S HOLDING THAT MANDATORY FEE PROCEEDS MAY NOT BE USED TO SUPPORT LOBBYING ON UNIVERSITY RELATED ISSUES ERRONEOUSLY DECIDES AN IMPORTANT ISSUE OF LAW.

In *Lehnert v. Ferris Faculty Ass'n*, --U.S.--, 114 L. Ed. 2d 572 (1991), this Court held that a union could use agency shop fees for lobbying relating to the ratification and implementation of its collective bargaining agreements, but not for purposes less directly related to the union's collective bargaining responsibilities. But while the connection between general lobbying activities and a union's collective bargaining responsibilities is "too attenuated to compel support by objecting employees" (114 L. Ed. 2d at 590), there is no "germaneness" problem here. University rules prohibit mandatory fees from being spent on issues that do

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[22]Although the decision below contemplates further judicial proceedings on the issue of whether mandatory fees can be used to pay for the ASUC Senate's political activities, this aspect of the decision is final under 28 U.S.C. §1257(a). "Adjudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits application of an exception to the general finality rule." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 55 (1989). Moreover, for the reasons discussed in text, the "ASUC Senate" issue is constitutionally indistinguishable from the issue of funding student political activity generally, and the California Supreme Court's ruling on that issue is unquestionably final. If the decision below stands, Petitioners will have to adopt a check-off and a *Hudson*-type refund procedure for the fee proceeds devoted to student groups and lobbying. Pet. App. 22a-23a, 27a. Yet this procedure would be quite unnecessary if Petitioners ultimately prevailed in this Court after further judicial proceedings on the "ASUC Senate" issue.

not relate to the University or its students. RT 362, 384, 1049, 1083-84.[23]

Moreover, the university's educational mission is not as circumscribed as a union's collective bargaining responsibilities (*see* pp. 20-21, *supra*), and the lobbying expenses at issue here directly advance the University's educational mission. Both the majority below and the dissent conceded that lobbying provides educational benefits to those involved. Pet. App. 27a, 51a. But the majority erred in thinking that lobbying benefitted only "a few student lobbyists" (Pet. App. 27a) and the dissent made a similar mistake in arguing that off-campus speech "does not contribute to the campus discussion of ideas . . . ." Pet. App. 51a. Lobbying cannot be divorced from on-campus political debate. The student lobbies stimulate discussion on campus by urging students to contact legislators (RT 355-56, 855); sponsoring on-campus debates on critical issues (RT 363-64, 479); conducting research on-campus to support positions taken by the lobbyists (RT 478); and encouraging students to participate in local boards and commissions. RT 427-28, 473. Once lobbying occurs, the lobbies publicize their positions on-campus by advertising in the student newspaper (RT 469) and distributing brochures to students. RT 470. The educational benefits lobbying provides are thus not limited to the lobbyists themselves.

The lobbying issue is closely related to the other issues this case presents. It would make little sense for this Court to set forth the constitutional standards applicable to the use of student fees to fund on-campus speech but to

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[23]This fact also differentiates this case from *Carroll v. Blinken*, 957 F.2d 991 (2d Cir, 1991), *cert. denied*, –U.S.–, 121 L. Ed. 2d 224 (1992), and *Galda v. Rutgers*, 772 F.2d 1060 (3d Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986). Both of those cases concerned funding of a "Public Interest Research Group," which lobbied on a wide variety of issues, many of which were totally unrelated to the university or its students. *See Carroll*, 957 F.2d at 994 (issues ranged from rates set by local area taxicabs to arms control).

leave in place the California Supreme Court's decision barring the use of such funds for off-campus lobbying. The two issues are obviously related, and should be adjudicated together.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: July 14, 1993. Respectfully,

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